



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**SHARON FOLEY,  
Requester**

**v.**

**SCHOOL DISTRICT OF PHILADELPHIA,  
Respondent**

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**Docket No: AP 2022-2258**

### **FACTUAL BACKGROUND**

On August 4, 2022, Sharon Foley (“Requester”) submitted a request (“Request”) to the School District of Philadelphia (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, “[f]or each 9<sup>th</sup> grader admitted to Central High School, the name of the middle school he/she attended. Th[is] data should be for the past 10 years.”

On September 8, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the District partially denied the Request, directing the Requester to two websites containing responsive information and noting that personally identifiable information contained in student records is barred from disclosure under the Family Educational Rights and Privacy Act, (“FERPA”), 20 U.S.C. § 1232g, and that publicly available data was suppressed to prevent the potential identification of individual students.

On September 27, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.<sup>1</sup> The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 3, 2022, the OOR granted the Requester’s request to keep the record open for an additional thirty days and the Requester granted the OOR a corresponding extension to issue the final determination.

On November 7, 2022, the District submitted a position statement, verified subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities, by Kimberly Dutch Esq., Deputy General Counsel, Compliance & Ethics for the District, reiterating its grounds for denial. The District claims that it provided responsive records in which it suppressed small cell student data pursuant to FERPA. The District also noted that it only possessed records for the last six years and is not required to create records that do not exist, 65 P.S. § 67.705. In support of its position, the District submitted the attestation made subject to the penalties of 18 Pa.C.S. § 4904,<sup>2</sup> of Keren Zuniga McDowell, Executive Director of the District’s Performance Office.

On November 7, 2022, the Requester submitted additional argument in support of her appeal. She argues that the District should provide unsuppressed records as she clearly stated she does not seek personally identifiable information and small numbers do not identify students.

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<sup>1</sup> The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

<sup>2</sup> The attestation cited to 18 Pa.C.S. § 4909, but upon clarification from the District on November 18, 2022, this was a typographical error.

## LEGAL ANALYSIS

The District is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the District is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

### **1. The Requester may not modify the Request on appeal and the websites contain information responsive to the Request**

The Requester may not modify or expand upon the Request on appeal. *See Michak v. Pa. Dep’t of Pub. Welfare*, 56 A.3d 925, 930 (Pa. Commw. Ct. 2012) (holding that “where a requestor requests a specific type of record ... the requestor may not, on appeal argue that an agency must instead disclose a different record in response to the request”). The Requester argues that she sought “the number of students who enrolled at, or are attending, Central High School,” however, the Request sought the names of middle schools for every student admitted to Central High School and further explained that personal information was not sought, just the name of the middle school for each student admitted into 9<sup>th</sup> grade and data could be grouped together for each middle school. Essentially, the number of students from each middle school admitted to Central High School.

“Enroll” is defined as “to enter or register in a roll, list or record,” while “admit” is defined as “to grant the right to enter; to accept into an organization.” *See* <https://www.thefreedictionary.com/enroll>; <https://www.thefreedictionary.com/admit>. Thus, an

admitted student does not necessarily mean an enrolled student. As this difference would constitute a modification of the Request on appeal, it cannot be considered and the OOR's review on appeal is confined to the Request as written. *See, e.g., Brown v. Pa. Turnpike Comm'n*, OOR Dkt. AP 2011-1287, 2011 PA O.O.R.D. LEXIS 998.

Because the websites provided contain information showing the number of students who were accepted into Central High (and also the number of students who accepted the offer) and generally, the corresponding middle school each student attended, the records provided are responsive to the Request.

**2. The District has demonstrated that suppression of small cell data to protect personally identifiable information is permissible under FERPA**

The Requester argues that the suppression of data is not necessary because the aggregate data requested is not personally identifiable information. The District asserts that it correctly withheld personally identifiable information exempt from disclosure pursuant to FERPA, explaining that the "school selection application outcomes reflected in the Application Data File are drawn down from raw information contained in each individual student's school selection application records." The verified Position Statement explains that the Application Data File is a spreadsheet that is created by pulling information from each student's school selection application records.

FERPA protects "personally identifiable information" contained in "education records" from disclosure, and financially penalizes school districts that have "a policy or practice of permitting the release of education records ... of students without the written consent of their parents." 20 U.S.C. § 1232g(b)(1). Regulations implementing FERPA define "education records" as those records that are "[d]irectly related to a student" and are "[m]aintained by an educational agency or institution or by a party acting for the agency or institution." 34 C.F.R. § 99.3.

While the express language of FERPA’s implementing regulation would appear to encompass all records held by an educational institution pertaining to a student, a review of case law interpreting FERPA reveals that not all of these records constitute “education records” as defined by FERPA. Just because a record involves a student does not automatically implicate the confidentiality provisions of FERPA. *See Bockis v. Agora Cyber Charter Sch.*, OOR Dkt. AP 2016-0845, 2016 PA O.O.R.D. LEXIS 848; *Newhouse v. Manheim Twp. Sch. Dist.*, OOR Dkt. AP 2016-0541, 2016 PA O.O.R.D. LEXIS 759. Additionally, where an education record may be redacted of personally identifiable information under FERPA, that record may be provided with redaction. *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 730 (Pa. 2020) (citing 34 C.F.R. § 99.31(b)(1)). The question of whether or not a record is an “education record” under FERPA is a case-by-case, fact-based analysis. *See Easton Area Sch. Dist. v. Miller*, 191 A.3d 75 (Pa. Commw. Ct. 2018) (education records can be non-academic but must relate directly to a student). “Personally identifiable information” is defined to include:

- a) The student’s name;
- b) The name of the student’s parent or other family members;
- c) The address of the student or student’s family;
- d) A personal identifier, such as the student’s social security number, student number, or biometric record;
- e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3. While the RTKL does not require an evaluation of the circumstances surrounding the request for records, FERPA does. *See* 34 C.F.R. § 99.3(g). The Commonwealth Court has stated that education records are not restricted to academic records; rather, “the appropriate inquiry

is whether the record—regardless of its subject matter— directly relates to a student....” *West Chester Univ. of Pa. v. Rodriguez*, 216 A.3d 503, 509-10 (Pa. Commw. Ct. 2019). Regarding the maintenance of education records, the Pennsylvania Supreme Court has concluded that a record being “generated and possessed” by the educational agency or institution is sufficient to establish that the record was “maintained” by the agency or institution. *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 730 (Pa. 2020).

Here, the Zuniga McDowell Attestation states that:

The raw student application data files contain other personally identifiable student information such as:

1. The name of the student,
2. The student’s date of birth,
3. The student’s phone number,
4. The student’s residential address,
5. The student’s identification number,
6. The student’s grade level,
7. The student’s attendance information,
8. The student’s race/ethnicity and gender
9. The student’s special education status,
10. The student’s English language learner level,
11. The student’s report card grades,
12. The student’s behavior grades,
13. The standardized test scores,
14. The student’s school selection application outcomes.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). The District has demonstrated that the responsive records contain information from the students’ school selection packets and that the school selection packets are attributable to individual students and maintained in the students’ individual files within the District and are therefore made

confidential under FERPA as education records.<sup>3</sup> *See Gym v. Phila. Sch. Dist.*, OOR Dkt. AP 2022-0067, 2022 PA O.O.R.D. LEXIS 781; *Yakim v. Comm. College of Allegheny Cnty.*, OOR Dkt. AP 2018-0021, 2018 PA. O.O.R.D. LEXIS 184 (finding that the agency proved that students’ application packets are attributable to individual students and are maintained in the students’ individual files within the College and are therefore records not subject to access under the RTKL); *see also Hilton v. Pittsburgh Sch. Dist.*, OOR Dkt. AP 2018-0616, 2018 PA O.O.R.D. LEXIS 981 (finding that applications of current and former District students are protected by FERPA and that the agency demonstrated that the applications contain personal identification information exempt from disclosure under the RTKL).

As mentioned above, where an education record may be redacted of personally identifiable information under FERPA, that record may be provided with redactions. *See Easton Area Sch. Dist.*, 232 A.3d at 730 (holding that a video that was not an education record could be released, provided that students’ images were redacted). The Requester argues that suppression of the number 0 should not be permitted and that using 20 as its suppression cutoff has no rationale and using a smaller number would not identify an individual student. The Zuniga McDowell Attestation states that the District regularly suppresses personally identifiable information:

- i. The District has a policy of and practice of suppressing personally identifiable information contained in education records pursuant to the Family Educational Records and Privacy Act (FERPA) and the National Center for Education Statistics (“NCES”) guidance on data de-identification.
- ii. The District ensures the protection of personally identifiable information, in part, by limiting the amount of data made publicly available for small groups within aggregated files and dashboards. This process of partially limiting the amount of data made public for small groups is referred to as suppression.

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<sup>3</sup> The OOR notes that the School District provided a hyperlink for records responsive to the Request. [School Information – District Performance Office \(philasd.org\)](https://philasd.org). This hyperlink provides additional links, among other things, to School Enrollment & Demographics, District Enrollment & Demographics, School Catchment Retention Details, School Catchment Retention Counts, and School Selection.

- iii. The [ ] District considers schools selection application outcomes as educational outcomes because admission is based, in part, on a student's academic performance along with other factors such as student attendance and in some instances a written essay.
- iv. The District's current practice is to uniformly suppress small cell data of fewer than 20 in alignment with the Pennsylvania Department of Education's data reporting practices and the state's minimum sample size required for reporting in Every Student Succeeds Act (ESSA) state plans.
- v. Initial suppression is performed when the number of individuals in a subgroup, or record combination requested, is less than 20. In other words, if the denominator of a particular row is less than 20, the numerator(s) and percentage(s) in that row will be suppressed. As outlined above, we suppress information for rows with fewer than 20 students, in this case, to protect a student with their application outcome from being personally identified by the public and the school community.

She further attests that, even if certain information were redacted, a reasonable person could still identify the student. Zuniga McDowell Attestation, ¶7. As the OOR finds the statement credible, the District has met its burden of proving that the suppression of small cell data is necessary to protect personally identifiable information under FERPA. *See Cherkas v. W. Jefferson Hills Sch. Dist.*, OOR Dkt. AP. 2021-0041, 2021 PA O.O.R.D. LEXIS 87 (finding that, where an agency provides evidence that redaction would not prevent the identification of a student, an education records is exempt in full under FERPA). Furthermore, the District's use of the number twenty as its cutoff point for data is reasonable as it aligns with the Department of Education's data reporting practices and the state's minimum sample size required for reporting in Every Student Succeeds Act (ESSA) state plans.

**3. The District has demonstrated that certain records do not exist and that it is not required to create a record**

The Requester sought this information for the last ten years. The District argues that it only maintains the information in the manner requested for the last six years and that it is not required to create a record that does not exist and distinguished *Pa. Dep't of Env't Prot. v. Cole*,



52 A.3d 541, 548 (Pa. Commw. Ct. 2012), and *Gingrich v. Pa. Game Comm'n* No. 1254 C.D. 2011, Pa. Unpub. LEXIS 38 (Pa. Commw. Ct. 2012).

In *Cole*, the requester sought Department records about the Pennsylvania Sunshine Program, which provides rebates to homeowners and small business for solar electric projects they install on their property. 52 A.3d at 543. The Commonwealth Court found that “[t]he information sought by Cole is a ‘record’ because it is information received and retained by the Department in conjunction with its ‘transactions and activities’ under the Sunshine Program.” *Id.* at 547. In distinguishing that *Cole* did not request the creation of a record or a unique format, the Court discussed *Gingrich*. In *Gingrich*, a requester sought information relating to Pennsylvania’s annual deer harvest, habitat programs, and related financial information. The information was contained in the Game Commission’s database and the requester suggested possible formats for the Game Commission to produce that information. *Id.* at 548 (internal citations omitted). The *Gingrich* Court found that suggesting a possible format in which to present the requested information was not an improper request to create a record and held that an agency can be required to draw information from a database, although the information must be drawn in formats available to the agency. *Id.*

The Zuniga McDowell Attestation states:

To be able to provide data for the years requested and not contained in the District’s Open Data file, [the District] would have to clean and process raw data, to the extent raw data exists, which requires writing new code and merging different tables.

Section 705 of the RTKL states that “an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705. Under the RTKL, an affidavit or statement made under penalty of perjury may serve as

sufficient evidentiary support. See *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the District has acted in bad faith or that the responsive records do exist, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Therefore, based on the evidence provided, including the attestation explaining that the District does not maintain the school selection information for the full time period requested in the format in which it was requested, the District has established that it would be required to create “additional coding or the merging of different tables” in order to create a spreadsheet responsive to the request. Accordingly, the District has met its burden of proving that it “does not currently compile, maintain, format or organize” the responsive records for the first four years of the timeframe identified in the Request. See 65 P.S. § 67.705; see also *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (holding that an agency cannot be made to create a record that does not exist).

The Requester also seeks a breakdown of the “Other” category on the provided records.<sup>4</sup>

The Zuniga McDowell Attestation states:

The data received by [the District] regarding students external to the District does not include District student identification numbers, school identification numbers, or school names.

Student identification numbers are typically used by [the District] to associate applicant information with a sending school. This is why the District reports non-public and non-District applicants in the aggregate- those students do not have District identification numbers, school identification numbers, or school names, with which to associate a sending school.

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<sup>4</sup> This category references students who attended a non-public school or schools external to the District but applied to a District school.

Accordingly, the District does not have an aggregate record that reports the number of applicants from each non-public or non-District school and is not required to create one.

As explained above, the District cannot be required to create a record that does not exist. Here, the District does not maintain the data for students external to the District in a non-aggregate report by middle school attended and to create a non-aggregated report would require the creation of a record.

### CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the District is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Philadelphia County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>5</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: November 21, 2022**

*/s/ Erin Burlew*

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SENIOR APPEALS OFFICER  
ERIN BURLEW, ESQ.

Sent via email to: Sharon Foley; Kimberly Dutch, Esq.

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<sup>5</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).